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REFERENCE TO COMMISSIONER IN CHANCERY.*

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§ 1. IN GENERAL.

Definition.—Reference is that part of chancery practice wherein the court employs the assistance of a commissioner in chancery by referring to him matters, which would consume the time and tax the industry of the court, for his investigation, findings and report.[1]

The scope of a treatise on reference necessarily embraces the authority for making and the propriety of the order of reference, the authority and proceedings of the commissioner to whom the reference is made, the commissioner's report and the subsequent proceedings thereon in the trial and appellate courts.

Purpose of Reference.—The purpose of reference is to relieve the work of the court[2] by permitting the taking of accounts and making inquiries out of court, thereby lessening the labors of the judge and the time of the sitting of the court.

[*Editor's Note.—All Code citations are to the Virginia Code of 1919 and to the West Virginia Code of 1913.]

1. **Reference is usually defined** in a narrower sense, as the act of a court of chancery in sending any matter to a commissioner in chancery. Indiana, etc., R. *v.* Bradley, 7 Ind. 49, 55.

2. **The main object of referring a cause** to a commissioner is to relieve the court of the labor of making calculations and unraveling tedious details of complicated accounts. Ward *v.* Ward, 21 W. Va. 262.

It is not error, but bad practice for a chancellor to take an account himself, except in simple and obvious cases, in order to save expense to litigants. In complicated transactions a reference should be made. Bryan *v.* Morgan, 35 Ark. 113.

§§ 2-18. COMMISSIONERS IN CHANCERY.

§ 2. IN GENERAL.—The reference is to a commissioner in chancery,[3] unless the parties interested agree and the court decrees it proper that accounts to be taken be referred to some other person.[4]

An order of the court of chancery, to make up an account, without saying before whom it is to be done, must be executed before one of the commissioners in chancery of the court.[5]

Quasi Judicial Officer.—A commissioner in chancery is a quasi judicial officer.[6]

In a decision arising under Article 7, sec. 8 of the Constitution of West Virginia conferring the power upon the governor to nominate and by and with the consent of the senate to appoint all officers whose offices are established by the Constitution or created by law and whose appointment is not otherwise provided for, it was held that commissioners in chancery may be appointed by the courts pursuant to an act of the legislature, as the power conferred upon courts of chancery is sufficient to authorize the legislation and because it would be impossible for the courts to properly transact their business without commissioners in chancery.[7] In deciding that a commissioner in chancery is not within the terms "all officers" of the constitution, but an essential part

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3. **Commissioners in Chancery.**—Va. Code, § 6179.

"The agency employed by the court of chancery to adjust and settle accounts, as also to make other complex inquiries, is that of a master commissioner." 4 Min. Inst., pt. 2, p. 1472.

Called "Master Commissioner" in Va. Code, § 2792. See Hickman *v.* Panter, 11 W. Va. 386.

"It is of little consequence whether the official designation of the person charges with such investigation is that of 'commissioner,' 'auditor' 'accountant,' 'assessor,' 'examiner,' or 'master,' although, as is well known, the ordinary designation in actions of law is that of 'auditor,' while in proceedings in equity it is that of 'master.'" Fenno *v.* Primrose (C. C. A.), 119 Fed. 801, 804.

4. Va. Code, § 6179.

5. Anderson *v.* Gest, 2 Hen. & M. 26.

6. **Quasi Judicial Officer.**—Mountain Lake Land Co. *v.* Blair, 109 Va. 147, 63 S. E. 751.

7. Lewis *v.* Rosler, 19 W. Va. 61.

of a court of chancery, the court exaggerates his judicial if it derogates from his official character.

Assistant to Court.—A commissioner in chancery is appointed to assist the chancellor and to relieve him in a large measure of duties incidental to the progress and determination of the cause.[8]

Branch, Arm or Representative of Court.—A commissioner in chancery is sometimes referred to as a branch,[9] arm,[10] representative or substitute[11] of the court.

Conservator of Peace.—A commissioner in chancery is a conservator of the peace and as such is within the exception to the act forbidding the carrying of concealed weapons.[12]

Importance of Office.—"That the office of commissioner in chancery is one of the most important known in the administration of justice will be universally conceded. His duties are of a grave and responsible nature; he is the assistant to the chancellor." [13]

In Kraker *v.* Shields, 20 Gratt. 377, it is said, "The most invaluable assistance may be afforded to the court by the agency of an intelligent, skillful, and experienced commissioner. He has often an advantage, which the court has not, in seeing and hearing the witnesses give their testimony, and being thus better able to judge of its weight. And where he acts only on the proofs already in the cause, as he often does, he may afford important aid to the court by deducing the material facts of the case from a large mass of testimony, and enabling counsel, by means of

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8. Assistant to Court.—In Dunlap *v.* Kennedy, 10 Bush (Ky.) 539, a commissioner is referred to as an assistant to the court.

9. Branch or Arm of Court.—Stewart *v.* Turner, 3 Edw. (N. Y.) 458.

10. They have been aptly termed the "arms of the court." Shipman *v.* Fletcher, 91 Va. 473, 22 S. E. 458. And see Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810.

11. Refrigerator Co. *v.* Gillette, 28 Fed. 673.

12. Conservator of Peace.—Withers *v.* Com., 109 Va. 837, 65 S. E. 16, construing Va. Code, § 4534.

13. Importance of Office.—Bowers *v.* Bowers, 29 Gratt. 697, quoted in Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.

exceptions to his report, to make up and present to the court the only issues requiring its decision in the cause."

But, in a leading article in the Virginia Law Register, it is said, "Commissioners in chancery are, as a rule, very good men, but it was never known that they were selected from those who stood at the top at the bar. On the other hand, as a rule, only young practitioners or older men who have not been able to lead as advocates or expounders, have been appointed by the courts to be commissioners in chancery. They are not, therefore, peculiarly fitted, as a class, to have bestowed upon them the solution of great questions for the decision of which the constitution and laws have established judicial tribunals and which were expected to be filled by the best talent of the bar." [14]

Regular and Special Commissioners.—In general treatises on this subject, commissioners are classified as regular and special. A regular commissioner is one who holds office for a term and whose powers extend beyond the performance of the duties incident to a particular matter referred to him.

A special commissioner is one appointed for a particular matter and whose office ceases upon its completion.[15] He has no authority after the return of his report.[16] A special commissioner is appointed by the order of reference.

Judge Brewer, writing the opinion in Arn *v.* Coleman, 11 Kan. 461, says: " 'A referee is born of an order; without it he is not.' And where he has performed the duty imposed by that order he is functus officio, and his acts are no more than the acts of a private individual. Up to the time his report is made and filed he can modify and change it, he can alter and amend it. But when once it has been filed and become a record of the court, his power over it is at an end, and his relation to the case has ceased." [17]

While neither the codes nor the decisions of the courts of Vir-

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14. 1 Va. Law Reg. 485.

15. Regular and Special Commissioners.—Williams *v.* Bowman, 3 Head (Tenn.) 678.

16. Oden *v.* Paul, 2 B. Mon. (Ky.) 45.

17. Baca et al. *v.* Unknown Heirs, 20 N. Mex. 1, 146 Pac. 945, Ann. Cas. 1918C, pp. 612, 614.

ginia or West Virginia refer, in terms, to special commissioners, the courts are given power to appoint commissioners, without definite term and removal at pleasure. Under this provision the courts are given power to appoint commissioners for the consideration of a particular matter only, which could be done in the order of reference or otherwise. The order of appointment could provide for the removal or the termination of the powers of the commissioner, under the provision giving the courts power to remove commissioners at pleasure. There is therefore no reason why the courts in these two states can not appoint a special commissioner, within the above definition. The Virginia Code also provides that if the parties interested agree or the court deems it proper the reference may be to some person other than a commissioner appointed as a regular commissioner in chancery. Upon a reference to him such person would be a special commissioner.

In this connection a special commissioner in chancery must not be confused with other special commissioners.[18]

Distinguished from Other Commissioners.—A commissioner in chancery is to be distinguished from a commissioner of court,[19] a commissioner of accounts[20] and a commissioner appointed by the governor out side of the state.[21]

Reference to Other Person.—Under the Virginia Code the reference need not be to a commissioner appointed by the court, as above, for, if the parties interested agree or the court decrees it proper, the reference may be to some other person.[22] But such reference is authorized for the taking of accounts only. The sentence giving the court power does not, like the next sentence in the same section, read "and matters." In some states such

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18. **Special Commissioner to Sell Land.**—Va. Code, § 6269.

19. **Distinguished from Other Commissioners.**—Va. Code, §§ 6267, 6262, 6272, 6273, 6279, 6295; W. Va. Code, §§ 5037, 5126.

20. **Commissioner of Accounts.**—W. Va. Code, § 5401 et seq.; W. Va. Code 1906, §§ 3912, 3300.

Of City of Norfolk.—See Va. Code, § 5940.

Of City of Roanoke.—See Va. Code, § 5952.

21. Va. Code, §§ 2853, 6226; W. Va. Code, § 2805.

22. **Reference to Other Person.**—Va. Code, § 6179.

person is called a consent commissioner and the reference a consent reference.[23]

Whether appointed by the court or by consent of parties, it would seem, the appointee would derive his authority from the order of reference,[24] and would be required to proceed according to the laws relating to reference to a commissioner in chancery.[25]

§ 3. APPOINTMENT AND TERM OF OFFICE.

§ 4. POWER TO APPOINT.—In the absence of statute a court of chancery has inherent power to appoint a commissioner in chancery.[26]

A circuit court of the United States has inherent power to appoint an auditor in any action at law, in the exercise of its discretion, where the issues or the items involved are so numerous or complex as to render a proper understanding of the controversy by the jury impossible until they have been simplified.

In Fenno *v.* Primrose (C. C. A.), 119 Fed. 801, 805, it is said, "Power to appoint an auditor in a proper case does not necessarily rest upon statutory provisions. Davis *v.* Railroad Co. (C. C.), 25 Fed. 786. Such power was a necessary incident of common-law procedure. Although in many of our states authority to appoint auditors is expressly conferred by statute, and although compensation is variously provided for in the different States, we look upon such legislation as largely declaratory and regulatory of the common-law power. Thus such legislation is a recognition of the common-law power, rather than the creation of a new power."

The Virginia Code provides that each circuit, corporation and city court having chancery jurisdiction, or the judge thereof in vacation, shall, from time to time, appoint commissioners in

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23. McDonald *v.* Kenney, 101 Ark. 9, 140 S. W. 999, 1002.

24. Carr *v.* Fair, 92 Ark. 359, 122 S. W. 659.

25. See McVeigh *v.* Chicago Mill & Lumber Co., 96 Ark. 480, 132 S. W. 638.

26. Claypool *v.* Johnston, 91 Ark. 549, 121 S. W. 941; Carr *v.* Fair, 92 Ark. 359, 122 S. W. 659.

chancery.[27] This provision extends the power to city courts having chancery jurisdiction.[28]

The city courts referred to are the Hustings Court of the City of Richmond, Part II,[29] the Chancery Court of the City of Richmond,[30] and the Law and Equity Court of the City of Richmond.[31] The code provides that a commissioner in chancery of the Chancery Court of the City of Richmond may be appointed a commissioner in chancery of the Law and Equity Court.[32] This provision should not be construed to take such court out of the operation of the general provision conferring power to appoint commissioners in chancery. No chancery jurisdiction is expressly conferred upon the Hustings Court of the City of Richmond.[33]

The Court of Law and Chancery of the City of Norfolk and the Court of Law and Chancery of the City of Roanoke are not within the general provision conferring power upon the court to appoint commissioners in chancery, but within special sections of the code. The Court of Law and Chancery of the City of Norfolk has power to appoint five commissioners in chancery, one of whom shall be designated as the commissioner of accounts of the court.[34] The code provides for the appointment by the judge of the court, but does not confer power to make the appointment in vacation. As the power is given the judge of the court and not to the court, the section of the code can be construed to confer the power to make the appointment in vacation. This con-

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27. Power to Appoint Commissioner.—Va. Code, § 6178.

28. Under Code of 1904.—There was no such provision in the old code. Va. Code 1904, § 3319.

Under Act of 1831.—The Virginia act to establish circuit superior courts, passed April 16, 1831, provided that the said courts "shall have power to appoint commissioners in chancery, not exceeding two for each court, for taking and reporting such accounts or other matters as such courts shall commit to them to be examined, stated and reported." Kraker *v.* Shields, 20 Gratt. 377.

29. Va. Code, § 5914.

30. Va. Code, § 5920.

31. Va. Code, § 5922.

32. Va. Code, § 5924.

33. Va. Code, § 5913.

34. Va. Code, § 5940.

struction is strengthened by reference to the provision giving the power of appointment of commissioners in chancery to courts generally.[35] The judge of the Court of Law and Chancery of the City of Roanoke is given power to appoint six commissioners in chancery, one of whom shall be designated as the commissioner of accounts of the court.[36] This section confers the power of appointment upon the judge, but, as the section relating to the Law and Chancery Court of the City of Norfolk, does not expressly give the power of appointment in vacation. The construction given above applies.

The West Virginia Code provides that, each circuit court and every court of limited jurisdiction for any incorporated city, town, or village, may from time to time appoint not more than four commissioners in chancery. The judge of any court empowered to appoint commissioners in chancery, may in vacation appoint such commissioners with as much effect as if appointed by the court.[37]

The provision of the Code of West Virginia authorizing courts to appoint commissioners in chancery is constitutional.[38]

In Lewis *v.* Rosler, 19 W. Va. 61, it is said, "It is also insisted, that the commissioners being appointed by the circuit courts, their appointment was unconstitutional, because it is contended, that under the requirements of § 8 of article 7 of the constitution they should be appointed by the governor. The act authorizing courts to appoint commissioners in chancery is constitutional. The power conferring upon the courts jurisdiction in all cases of equity is sufficient to authorize the legislature to declare by statute, that courts might appoint commissioners, as it would be impossible for the courts to properly transact their business without such officers; and in the courts is properly lodged the power of their appointment."

Bail Commissioner.—The Virginia Code provides that the circuit court of each county, or the judge thereof in vacation, shall

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35. Va. Code, § 6178. See generally as to powers in vacation. Va. Code, §§ 6307, 6308.

36. Va. Code, § 5952.

37. In West Virginia.—W. Va. Code, § 4846.

38. Lewis *v.* Rosler, 19 W. Va. 61.

appoint one of the commissioners in chancery of the court bail commissioner for the county.[39] This power is conferred on the circuit court only.

Can a bail commissioner so appointed act for a municipal corporation? It would seem, clearly, that he can not. The first reason for this conclusion is that the circuit court appointing him has no criminal jurisdiction within the municipal corporation. Under the Virginia Constitution the concurrent jurisdiction of the court is limited to actions at law and suits in equity, and the Code expressly provides that no circuit court shall have original or appellate jurisdiction in criminal cases arising within the territorial limits of any city wherein there is established by law a corporation or hustings court. The second reason is that the commissioner is appointed "for the county," which excludes his acting for the municipal corporation.

§ 5. WHO MAY BE APPOINTED.—To be eligible for appointment to the office of commissioner in chancery no special qualification other than that to hold any other office is required. There is no provision in either the constitutions or statutes of Virginia or West Virginia stating any requirement of special qualification for commissioner in chancery nor requiring that they be or not be appointed from any special class. The only provision that is applicable in this connection is that prohibiting certain officers holding any other office or trust.

Of course, as a matter of practice, commissioners in chancery are customarily appointed from the members of the bar, but this is not required.[41]

Judges.—The constitutions of both Virginia[42] and West Virginia[43] provide that no judge shall hold any other office or public trust during his continuance in office. To the provision of the Constitution of Virginia there is an exception empowering a judge of a corporation or hustings court in a city of the second

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39. Bail Commissioner.—Va. Code, § 6188.

41. For general provisions relating to disqualification to hold office, see Va. Code, §§ 289 to 291.

42. Va. Const., § 105. See also, Va. Code, § 5976.

43. W. Va. Const., Art. VIII, § 16.

class to hold the office of commissioner in chancery of the circuit court for the county in which the city is located.[44]

A city of the second class is one of less than ten thousand inhabitants.[45] The Virginia Code provides that for the purpose of a judicial system, the following cities, which as shown by the United States census of nineteen hundred and ten, or other census provided by law, contain ten thousand inhabitants or more to wit: Alexander, Danville, Lynchburg, Newport News, Norfolk, Petersburg, Portsmouth, Richmond, Roanoke, Staunton, Hopewell and Charlottesville, are declared to be cities of the first class; and all other cities in the State are declared to be cities of the second class. Fredericksburg, Winchester, Bristol, Radford, and Buena Vista are declared to be cities of the second class.[46] This provision is merely declaratory of the constitution. It is a legislative finding of the fact that the various cities contain a certain population. The quesion is, however, a judicial one and to be determined by the courts when the question actually arises. The mere fact that the legislature so declares will not keep Hopewell in the first class. The constitutional requirement of ten thousand inhabitants and not the naming by the legislature determines a city of the first class.

The provision of the West Virginia Constitution applies only to judges commissioned by the governor,[47] which include the judges of the Supreme Court of Appeals and of the circuit courts.

§ 6. QUALIFICATION—OATH AND BOND.—A commissioner in chancery must qualify by taking and subscribing an oath.[48] There is no requirement in the section of the Virginia Code relating thereto that the person other than a commissioner in chancery, appointed by the court or by consent of the parties, shall be sworn.[49] While such person is not an officer, he is undoubt-

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44. Va. Const., § 105; Va. Code, § 5976.

45. Va. Const., § 98.

46. Va. Code, § 5905.

47. W. Va. Const., Art. VIII, § 16.

48. Oath.—See Va. Const., § 34; Va. Code, § 269. For penalty for failure to take oath, see Va. Code, § 288.

49. Va. Code, § 6179.

edly within the provision "every person before entering upon the discharge of any function as an officer"[50] and must take and subscribe the oath of an officer.

The West Virginia Code provides that every commissioner, before proceeding to act, shall take an oath faithfully and impartially to discharge his duties.[51]

It has been held by the Supreme Court of the United States that, although it is customary to require an oath or affirmation that the referees appointed will well and faithfully hear and examine the case and make a just and true report thereon, yet the objection that referees were not sworn will be waived by appearing and going to trial without requiring an oath to be administered.[52] The Virginia Code does not make the acts of a commissioner who fails to take and subscribe the required oath void, but affix a penalty for such neglect.[53]

A bond is not required in either Virginia or West Virginia of a commissioner in chancery. But a special commissioner appointed to make a sale of property under decree of the court is required to give bond.[54]

Presumption as to Regularity of Appointment and Qualification.—Where the order of the circuit court, referring a cause to a person to take, state and settle an account of indebtedness, designates him "a master commissioner of this court," and there is nothing in the record to show he was not one of the commissioners of the court; the appellate court will, in such case, consider him regularly appointed and qualified as such commissioner.[55]

§ 7. TERM OF OFFICE.—A commissioner does not hold office for any definite or fixed period, but until removed at the pleasure of the court.[56] His office is permanent and his duties continuous until interrupted by his removal.

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50. Va. Code, § 269.
51. W. Va. Code, § 4847.
52. Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085.
53. Va. Code, § 288.
54. See Va. Code, §§ 6272, 6273.
55. Hickman *v.* Painter, 11 W. Va. 386.
56. Term of Office.—See Va. Code, § 6178; W. Va. Code, § 4846.

The authority of a special commissioner terminates on the completion of his duties.[57] He has no authority after making his report.[58]

§ 8. REMOVAL FROM OFFICE.—A commissioner is removable at the pleasure of the court appointing him, in Virginia[59] and West Virginia.[60] The court has absolute control over its commissioners, with the power to remove them at its discretion; and unless such discretion is plainly abused, to the prejudice of the parties to the litigation, the appellate court can not interfere.[61]

The court may remove a commissioner without a judicial proceeding.[62]

Grounds for Removal.—As the court has power to remove a commissioner at pleasure, it is not necessary that the action of the court be based on sufficient grounds or on any grounds at all, nor is the court required to exercise its discretion. The court acts at its pleasure and its action can not be in any way questioned, unless the removal would be evidence of bad faith or malfeasance in office. Even in that event the action of the court would be valid and binding as to the removal of the commissioner. It has been held in a case in a Federal court that a mistake of a master which was not done in bad faith or with malice is not sufficient ground for his removal on a motion made eight years thereafter.[63]

A special commissioner removed by the circuit court without notice or good cause shown can not appeal from the decree removing him.[64]

Removal by Repeal of Law or Abolition of Court.—The repeal of a law authorizing a reference to a commissioner for the settlement of an account revokes the authority of the commis-

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57. Williams *v.* Bowman, 3 Head (Tenn.) 678.
58. Odew *v.* Saul,. 2 B. Mon. (Ky.) 45.
59. **Removal from Office.**—See Va. Code, § 6178.
60. See W. Va. Code, § 4846.
61. Arbogast *v.* McGraw, 47 W. Va. 263, 34 S. E. 736.
62. People *v.* Welty, 75 Ill. App. 514.
63. Mason *v.* Pewobic Mining Co., 100 Fed. 340.
64. Arbogast *v.* McGraw, 47 W. Va. 263, 34 S. E. 736.

sioner to make the account,[65] and the powers of a commissioner appointed to execute a decree of a court of chancery ceases when the court of which he is appointed is abolished or ceases to exist.[66]

Powers after Removal.—After his removal a commissioner in chancery can not complete matters previously begun.[67] Proceedings of a commissioner subsequent to the abolition of his office by statute[68] or the expiration of the court appointing him[69] are void. Where the commissioner had taken the testimony offered by the plaintiff, which was only a part of the work he was directed to do, when his term of office ended, he could proceed no further. The order of reference had become inoperative by the retirement from office of the commissioner, and the presid-

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65. Removal of Repeal of Law.—State *v.* Brookover, 22 W. Va. 214.

In an action of debt brought on the official bond of a sheriff, by consent an order was made under § 5 of chapter 138 of acts of 1872-73, referring the case of a commissioner to audit and state an account and strike a balance between the plaintiff and defendants in the matter of difference between them; and while the case was before the commissioner, the facts of the case were all agreed in writing by the parties; and on this agreed state of facts the commissioner after the repeal of said law on March 14, 1881, by chapter 34, § 2 of the acts of 1881, settled the account and made a report finding a specified sum due to the plaintiff. The defendants excepted to this report, and the court sustained the exceptions, and in its order proceeded thus: "And this court proceeding to make such finding, as the commissioner should have found upon the agreed facts filed before said commissioner, it is considered by the court, hat the plaintiff take nothing by his bill, and that the defendants go thereof without day and recover against the plaintiff their costs about their defense in their behalf expended." It was held, that the repeal of the law authorizing such a reference in such action revoked the authority of the commissioner to settle such account and report the result to the court; and the court by virtue of said law had no authority to act upon and sustain the exceptions to said report. State *v.* Brookover, 22 W. Va. 214.

66. M'Laughlin *v.* Janney, 6 Gratt. 609.

67. Powers after Removal.—Saunders *v.* Pinckney, 1 Rish. Eq. (S. C.) 227.

68. Palethrop *v.* Palethrop, 184 Pa. St. 585, 39 Atl. 484.

69. M'Laughlin *v.* Janney, 6 Gratt. 609.

ing judge had full power and was obliged to proceed with the trial, or, if he saw proper, make another order of reference.[70]

§ 9. NUMBER OF COMMISSIONERS.—The Virginia Code provides that the court may appoint such commissioners in chancery as may be deemed necessary for the convenient dispatch of the business of the court.[71] The only limitation on the number of commissioners is that they are deemed necessary. They need not be actually or reasonably necessary, but merely deemed necessary, and this is a question for the appointing court to decide.

The Court of Law and Chancery of the city of Norfolk may appoint five[72] and the Court of Law and Chancery of the City of Roanoke six[73] commissioners in chancery, one of whom shall be designated as commissioner of accounts for the court, but the judge of the latter court may appoint as commissioner of accounts the same person who is commissioner of accounts for the corporation court.[74]

The West Virginia Code provides that each circuit court and every court of limited jurisdiction for any city, town or village may appoint not more than four commissioners in chancery, except that the circuit court of any county whose population exceeds thirty thousand and less than fifty thousand, may appoint not more than six of such commissioners, and that the circuit court of any county whose population exceeds fifty thousand, may appoint not more than eight of such commissioners.[75]

§ 10. DISQUALIFICATION TO ACT.—Where a commissioner is called upon to act judicially, he is disqualified by interest in the cause or relationship to or connection with the parties. He is subject to the same rules as apply to a judge similarly situated. As to ministerial acts he may not be disqualified by interest or connection with the parties. But it can not be conceived that a

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70. Heyward *v.* Middleton, 65 S. C. 493, 43 S. E. 956, 957.

71. Number of Commissioners.—Va. Code, § 6178.

For Provisions of Code of 1904, see Va. Code 1904, § 3319.

72. Va. Code, § 5940.

73. Va. Code, § 5952.

74. Va. Code, § 5952.

75. Va. Code, § 4846.

case can ever arise in which a commissioner can, complete a reference without taking judicial action.

A commissioner, who is a creditor and a party to suit to subject debtor's land to pay his lien debts, is incompetent to take an account ordered therein.[76]

An attorney employed in a cause is not a competent commissioner to take an account ordered in the couse.[77]

In Dillard *v.* Krise, 86 Va. 410, 10 S. E. 430, it is said "The fifth exception to the report is upon the ground that it appears upon its face to have been made by one who is a creditor and a party to the suit. As such, though he is a commissioner of the court, he is incompetent to make a report in the cause. Simmons *v.* Lyles, 27 Gratt. 922, 928. In Bowers *v.* Bowers, 29 Gratt. 697, this court decreed that an attorney employed in a cause is not a competent commissioner to take an account ordered in the cause. No judge would sit in a cause wherein he was interested or a creditor; and a commissioner of accounts is a quasi judicial character, and if the law does not, in terms, disqualify him to take and report an account in a cause wherein he is a party, the spirit of it does."

Waiver of Objection.—Objections to the competency of a commissioner to take an account, which were known to exist at the time the cause was referred to him, can not be asserted for the first time after it has been ascertained that his report will be adverse to the exceptant.[78] This objection can not be made on collateral attack.[79]

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76. Etter *v.* Scott, 90 Va. 762, 19 S. E. 776.

77. Attorney.—Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016; Shipman *v.* Fletcher, 91 Va. 473, 481, 22 S. E. 458; Dillard *v.* Krise, 86 Va. 410, 10 S. E. 430; Smith *v.* Mayo, 83 Va. 910, 5 S. E. 276; Davis *v.* Beazley, 75 Va. 491; Bowers *v.* Bowers, 29 Gratt. 697; Findley *v.* Smith, 42 W. Va. 299, 26 S. E. 370.

It is error to appoint an attorney in a case a commissioner to execute a decree for account therein, because the commissioner acts in a judicial capacity. But, if done, the error may be corrected in vacation. Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016.

78. Peery *v.* Elliott, 101 Va. 709, 44 S. E. 919.

79. Elzutter *v.* Ins. Co., 86 Fed. 500.

Appointment of Substitute Commissioner.—The West Virginia Code provides that in case all the commissioners of a court are by reason of interest or otherwise incapacitated to act, and the parties interested fail to agree on a person to whom the reference may be made, the court may direct a reference to some other person.[80]

§ 12. POWERS, DUTIES AND LIABILITIES—§ 13. IN GENERAL.—Both by the Virginia and West Virginia Codes it is provided that "every commissioner shall examine and report upon such accounts and matters as may be referred to him by any court."[81]

Compared to Master in England.—The duties of a commissioner in chancery in this state are considered to be, generally, the same as those of a master in chancery in England, whose duties are set forth in the books of chancery practice in that country.[82]

§ 13. SOURCE OF POWERS.—The powers of a commissioner are conferred by the order of reference in the absence of statutes.[83] The rule of reference, when made, determines the extent of the powers of the referee. Every enlargement of the rule is, in effect, a new reference. The mere statement in the referee's report of the enlargement of the rule of reference is not sufficient

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80. W. Va. Code, § 4848.

81. Va. Code, § 6179; W. Va. Code, § 4848; Kraker *v.* Shields, 20 Gratt. 377; Hartman *v.* Evans, 38 W. Va. 669, 18 S. E. 810. The particular powers of a commissioner are enumerated under "Proceedings or Reference," post.

"References to the master upon decrees or decretal orders, are either: 1. To make inquiries; 2. To take accounts and make computations; or, 3. To perform some special ministerial acts directed by the court." Kramer *v.* Shields, 20 Gratt. 377, quoting 2 Daniel's Chancery Pl. & Pr. § 7, pp. 1345-1503.

While it is true as stated that references are to make inquiries and take accounts, it is not strictly so as to ministerial acts. A ministerial act is not the subject of reference, but is performed by the exercise of a power given the commissioner that is independent of reference.

82. Kraker *v.* Shields, 20 Gratt. 377.

83. Source of Powers.—Gordon *v.* Hobart, 10 Fed. Cas. 5, 608.

evidence that it was regularly enlarged.[84] In Virginia and West Virginia the powers of a commissioner in chancery are given by statute.[85]

In states where the powers of a commissioner are given by the order of reference, it is held that such power can not be given by the consent of the parties.[86] But under the Virginia Code the parties may consent to a reference to a person other than a commissioner. The powers of such person are conferred by the parties but are limited to taking accounts by the code.[87]

A special commissioner appointed by a decree of court is simply the creature of the court, and he has no powers except those conferred upon him by the court of his appointment and the course of practice of the court.[88]

In Blair *v.* Core, 20 W. Va. 265, it is said "The office of a special commissioner under the statutes and rules of chancery practice of this state is the same in many cases as that of a receiver under the general chancery practice in England and in many of the states. Excluding that class of commissioners known as commissioners in chancery, whose duties are to take, state and report accounts, the only difference in the practice in this state seems to be, that in cases of sales the officer appointed to execute the orders of the court is designated a special commissioner, while in cases, where the duties are more general and comprehensive, he is designated receiver either general or special; the former being merely a species of the latter."

§ 14. NATURE OF POWERS—*Judicial and Ministerial.*—A commissioner performs both judicial[89] and ministerial duties.[90]

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84. Lazell *v.* Houghton, 32 Vt. 579, 583.

85. See Va. Code, §§ 6178-6187; W. Va. Code, §§ 4846-4855.

86. Consent of Parties.—Gordon *v.* Hobart, 10 Fed. Cas. 5, 608. But see McCarmock *v.* Jones, 36 Fed. 14.

87. Va. Code, § 6179.

88. Blair *v.* Core, 20 W. Va. 265.

89. Judicial and Ministerial Acts.—Refrigerator Co. *v.* Gillette, 28 Fed. 673; Fayette Land Co. *v.* Louisville, etc., R., 93 Va. 274, 24 S. E. 1016.

90. Snyder *v.* Stafford, 11 Paige (N. Y.) 71; Hards *v.* Burton, 79 Ill. 504.

His acts relating to matters referred to him are chiefly judicial, although there necessarily arise certain routine and incidental duties which are ministerial. In matters independent of reference his acts are principally ministerial, but not necessarily so.

Inquisitorial Rather Than Judicial.—The office of a commissioner is to inquire and report upon facts, not to decide; it is inquisitorial rather than judicial. He is not a vice chancellor, nor are his duties those of the master of the rolls, under the English system. His conclusions have no validity whatever, until adopted and vitalized by decree of the chancellor. Hence, arguments and processes of reasoning are out of place in his reports which should give only results stated clearly, succinctly, and intelligibly, with the proofs upon which they rest. All else is superfluous.[91]

§ 15. POWERS AND DUTIES INDEPENDENT OF REFERENCE—*To Administer Oaths.*—A commissioner in chancery may administer an oath or take an affidavit. He has the same powers as a justice of the peace. Any oath or Affidavit required by law, which is not of such nature that it must be made in court, may be administered by or made before a commissioner in chancery, unless otherwise provided.[92] Such commissioner may administer an oath to a witness.[93]

To Take Acknowledgment.—A commissioner in chancery of a court of record has power to take the acknowledgment of a writing for admission to record.[94] Where a certificate of acknowledgment sets forth in the body thereof that the acknowledgment was made before a commissioner in chancery, and it is also subscribed by him as such officer, this description implies that he was a commissioner of a court of record, as there was no other commissioner in chancery in this state.[95]

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91. Evans *v.* Evans, 2 Coldw. (Tenn.) 143. See Va. Code, § 6179.

92. Power to Administer Oath.—Va. Code, § 274, cited in In re Soney, 134 U. S. 374, 33 L. Ed. 949, 10 Sup. Ct. 584.

93. See Va. Code 8622; W. Va. Code, §§ 4846, 4896. As to witness living out of state, see Va. Code, § 226.

94. To Take Acknowledgment.—Va. Code, § 5205.

95. Hurst *v.* Leckie, 97 Va. 550, 34 S. E. 468, 75 Am. St. Rep. 798, 5 Va. Law Reg. 594, 630.

To Take Depositions.—A commissioner in chancery has power to take the deposition of a witness, whether a party to the suit or not; and, if certified under his hand may be received in evidence without proof of the signature to the certificate.[96]

To Perpetuate Testimony.—A commissioner in chancery has power to perpetuate testimony.[97]

To Decide Tie in Vote of Supervisors.—A commissioner in chancery shall be designated in each county to cast the deciding vote in case of a tie vote of the board of supervisors where all members of the board are present.[98] The commissioner is designated by the circuit court of the county or the judge thereof in vacation. The court is not required to appoint an extra commissioner, but to "designate one of the commissioners in chancery of such court." The designation is by order entered in the common law order book of the court.[99]

§ 16. TERRITORIAL EXTENT OF POWERS.—The territorial extent of the powers and duties of a commissioner in chancery is, in the absence of statute, co-extensive with that of the appointing court. The reason for this is the local powers of the appointing court.

The territorial limits of the commissioner's powers can be extended by the consent of the parties interested. In that case the authority of the commissioner is given by the parties and not by the court.

In Anderson *v.* Gest, 2 Hen. & M. 26, it is said: "This court can not change its course on account of the residence of parties. All who are ordered to account must do so, before one of its masters, or before commissioners appointed by it, which it can only direct within its own jurisdiction, unless the parties consent to commissioners without, in which case it is their act, and not the act of the court, and to which the court will not object."

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96. Va. Code, § 6225; W. Va. Code, § 4890.

97. To Perpetuate Testimony.—Va. Code, § 6235; W. Va. Code, § 4896.

98. To Decide Tie in Vote of Supervisors.—If all members are not present the question shall be passed until the next meeting when all members are present. Va. Code, § 2717.

99. See Va. Code, § 2718.

Adjournment to Another County.—The Virginia Code provides that a commissioner in chancery of any court to whom has been referred any account or other matter may, if it shall appear to him necessary, adjourn such proceedings from his own county or corporation to any other county or corporation of the state, and there continue such proceedings and take depositions and other evidence in like manner and with like force and effect as if the same were done in his own county or corporation. And such commissioner shall have the power to compel the attendance of witnesses before him in the manner as if proceeding in his own county or corporation.[1] Under this provision the territorial limits of the powers of a commissioner are the boundaries of the state. By implication he is restricted to such limits.

Powers Independent of Reference.—It is to be noted that the section of the Virginia Code above applies only to a reference of an account or other matter. It would seem, as to powers and duties to be performed independent of reference, that the powers and duties of a commissioner in chancery, like those of a notary, justice of the peace or other officer acting in a quasi judicial capacity, are local to the territorial area in which he is appointed to act, and, if performed outside of such territory are illegal and invalid.[2]

The presumption in favor of the validity of an act of the commissioner includes the presumption that the act was performed within the territorial limits of his jurisdiction and that he did not act outside of such limits, although there is nothing in evidence to show that it was performed within the jurisdiction.[3] As to acts evidenced by the commissioner's certificate, as the certificate of acknowledgment of a deed for record, the presumption is held to be conclusive upon collateral attack.[4]

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1. Va. Code, § 6184.

2. See "Validity and Effect of Quasi Judicial Acts Outside of Jurisdiction," 4 Va. Law Reg. (N. S.) 81.

3. See Dyer *v.* Flint, 21 Ill. 80, 72 Am. St. Rep. 73.

4. See Carper *v.* M'Dowell, 5 Gratt. 212. But see Bell *v.* Wood, 94 Va. 677, 27 S. E. 504.

§ 17. LIABILITY OF COMMISSIONER.—A commissioner is not liable for his judicial acts, but for those that are ministerial he is liable for loss or injury to others caused by his neglect or misfeasance. A commissioner to sell land who receives the purchase money without authority is liable to the purchaser for the amount received with interest.[5]

But a commissioner who, under the direction of the court, collects and disburses Confederate money, and, by order of the court, retains the balance, which is in controversy between disputing lien holders, until the rights of the parties are litigated, can not be held personally liable for any loss that may be incurred in consequence of the fund perishing on his hands, by the result of the late civil war.[6]

§ 18. COMPENSATION OF COMMISSIONER.—For services other than those which might be performed by a notary, the Virginia Code provides that commissioners in chancery shall receive "such fees as the court by which the commissioner is appointed may from time to time prescribe not exceeding one dollar where less than an hour is employed, and if more than an hour be employed not exceeding the rate of one dollar for each hour." [7]

The West Virginia Code provides that a commissioner shall receive for any service, such fees as the court of which he is commissioner may from time to time prescribe not exceeding seventy-five cents where less than an hour is employed, and if more than an hour be employed, not exceeding the rate of seventy-five cents for each hour, or in lieu thereof, twenty cents per hundred words, as the commissioner may elect.[8]

These code provisions are mandatory and can not be exceeded.[9]

Services Not Required by Order of Reference.—A commis-

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5. **Liability of Commissioners.**—Donadue *v.* Tackles, 21 W. Va. 124.
6. Davis, Comm'r *v.* Harman, 21 Gratt. 194.
7. **Compensation of Commissioner.**—Va. Code, § 3482.
8. W. Va. Code, § 5037.
9. Roby *v.* Chicago Title Co., 194 Ill. 258, 62 N. E. 544.

sioner will not be allowed compensation for services not required by the order of reference and without its scope.[10]

Annexation of Certificate of Fees.—The Virginia Code, provides that "A commissioner returning a report shall annex thereto an affidavit, that he was diligently employed not less than —— hours in performing the services for which the fees stated at the foot thereof are charged. Until such affidavit is made, no bill shall be made out for said fees. A commissioner shall not be compelled to make out or return a report until his fees therefor be paid, or security given him to pay so much as may be adjudged right by the court to which the report is to be returned, or, if it be a circuit court, by the judge thereof in vacation, unless the court or judge see cause to order it to be made out and returned without such payment or security, shall so order." [11]

The West Virginia Code provides "A commissioner returning a report shall annex thereto a certificate, under oath, that he was actually and necessarily employed for a number of hours to be stated therein, in performing the services for which the fees stated at the foot thereof are charged. Until such certificate is made, no such fees shall be allowed or paid. A commissioner shall not be compelled to make out or return a report until his fees therefor be paid or security given him to pay so much as may be adjudged right by the court to whom the report is to be returned, or if it be a circuit court, by the judge thereof in vacation, unless the court or judge see cause to order it to be made out and returned without such payment or security, and shall so order." [12]

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10. See Foster *v.* Judge, 128 Mich. 377, 87 N. W. 258. But see Bank *v.* Bank, 12 R. I. 497.

11. Va. Code, § 3482.

12. W. Va. Code, § 5041.

Where a report of a commissioner, under an order or decree of reference is returned, it is the duty of the court, when called to its attention, to see that the certificate under oath, of the fees, and time employed of the commissioner, as required by § 5, ch. 137, is annexed thereto, and that no fees be allowed or paid thereon until such certificate is made. Weigand *v.* Alliance, etc., Co., 44 W. Va. 133, 28 S. E. 803.

The commissioner should file an itemized statement of the official services rendered by him and of the fees allowed by law for each item of service. A charge in gross furnishes a convenient cover for illegal fees and for extortion, and should not be received or acted upon by the chancellor.[13]

Exceptions to Fees Charged.—[14]

Payment of Fees—Taxed as Costs.—On a hearing before a master, each party should pay, in the first instance, the costs, charges, expenses, stenographer's fees, and master's fees for taking its own direct, redirect, cross, or recross examination of any witness or witnesses; but on final decree the sum so paid by the prevailing party may be imposed on the defeated party.[15]

If, on a motion in a county court, on the common-law side thereof, it becomes proper to refer to a commissioner, longstanding and perplexed accounts, for the purpose of facilitating the investigation of the cause to the parties, and to the court, and such reference is made by order of the court, and with the assent of the parties, the fee of the commissioner, for stating and reporting the accounts, ought to be taxed in the bill of costs, and a judgment for those costs ought to be rendered against the party who had to pay the general costs. If such taxation is made, and noted by the clerk of the county court at the foot of the record, it will be presumed by the appellate court, that the order for such taxation was made by the court itself (it not being a matter of course with the clerk, to include such fee in his taxation of costs), though it does not appear on the minutes of the court.[16]

Stenographer's Fees.—It has been held that a commissioner in chancery is not entitled to an allowance as costs for stenographer's fees for taking testimony before him.[17]

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13. Smyth *v.* Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Amer. Reports, 314, 320.

14. See post.

15. Brickill *v.* Mayor, 55 Fed. 565.

16. Leachman *v.* Overseers, 2 Va. Cas. 399.

17. Smyth *v.* Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314.

In Baker *v.* Fitzgerald, 204 Ill. 325, 68 N. E. 430, 433, the court said: "An objection is made to the allowance of fees to the master. The court allowed to the master the statutory fees for taking testimony. It appears that by agreement the parties employed a stenographer, and paid him fifty cents a page for reporting the testimony. Thus the master was saved the labor of writing out the testimony. No portion of the fifty cents per page was received in any way by the master. Notwithstanding that the master did not have to write down the testimony, he had to listen to it, examine and certify to the correctness of every word transcribed by the stenographer, or change the same to correspond with the actual testimony. That done by the parties was not at the master's request, and was doubtless a great saving to the parties in the way of time and solicitor's fees. The instance is entirely unlike that commented upon in Schnadt *v.* Davis, 185 Ill. 476, 57 N. E. 652. We see no reason for interfering with the order of the court as to costs."

The Code of West Virginia provides, for services during the trial of any cause in a court, stenographers may be allowed a reasonable compensation for their services and expenses and that such compensation shall be taxed as a part of the costs recovered. As proceedings on reference arising during the trial of a cause, stenographer's fees incurred in the execution of the order of reference may be taxed as costs under this provision.

There seems to be no similar provision in the Virginia Code and no reported decision on the question. However, as a matter of practice, stenographer's fees are allowed as an item of the costs in proceedings on reference.

For Service as Notary.—The Virginia Code, provides that commissioners in chancery shall receive for services which might be performed by notaries, the like fees for the services.[18]

Forfeiture of Compensation.—Under the Code of West Virginia a commissioner may forfeit his right to compensation by delay.[19]

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18. Va. Code, § 3482.
19. W. Va. Code, § 4853.

Commissioner of Accounts.—In Virginia the fees of commissioners of accounts are the same as for commissioners in chancery.[20]

The West Virginia Code provides that "For services rendered by any commissioner of accounts, the same compensation shall be allowed for similar services as are herein allowed to commissioners of courts." [21]

§§ 19-22. SUBJECTS OF REFERENCE.

§ 19. IN GENERAL.—It has been stated frequently that references to a commissioner may properly be ordered where it is necessary to (1) adjust and settle accounts or (2) make complex inquiries, or (3) for the performance of ministerial functions, as to sell property under decree of court, make partition, assign dower, etc.[22]

The Virginia Code reads "such accounts and matters as may be referred." [23] The word "matters" is to be construed with reference to its context and its meaning is limited by the use of the word "accounts." But in this connection it is to be remembered that reference is an inherent power of a court of chancery and is not created by statute. Further, there is no reason to believe the legislature has in any way attempted to restrict either the power of the court or the subjects that may be referred. No such policy is manifest either in the section of the code under consideration or in any other act.

§ 20. TO STATE ACCOUNTS.—The taking of an account is a proper subject of reference.[24] "When a cause or action in-

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20. Commissioner of Accounts.—Va. Code, § 5414.

21. W. Va. Code, § 5038.

22. Subjects of Reference.—4 Min. Inst., pt. 2, pp. 1461-1472. Ward *v.* Ward, 21 W. Va. 262.

In Daniels Ch. Pl. & Pr., it is said that "references to the master upon decrees or decretal orders, are either: 1. To make inquiries; 2. To take accounts and make computations; or, 3. To perform some special ministerial act directed by the court."

23. Va. Code, § 6179.

24. To State Accounts.—Va. Code, § 6179.

School Accounts.—See W. Va. Code, § 4446.

volves matters of account or other intricate details which require minute examination, and for that reason are not fit to be brought before a jury, it is usual to refer the whole case, or some part of it, to the decision of an auditor or referee." [25]

In Bell *v.* Dewoody, 1 Overton (Tenn.) 478, it is said, "In matters of account, if the legality of a debit or credit be disputed, it is the practice for the court to settle the point of law, and the clerk and master is to make the calculation of the amount and balance."

To Enable Complainant to Make out His Case.—It is a familiar rule of practice that an order for account will not be awarded to enable the complainant to make out his case, but the party asking for an account must show that he is entitled to it.[26]

In Tilden *v.* Maslin, 5 W. Va. 377, Judge Berkshire, in rendering the opinion of the court, on page 379, says: "It was insisted in the argument here that an account should have been ordered by the circuit court, to enable the appellant Tilden to establish his alleged set-off and account against Seymour. But the uniform doctrine of courts of equity is that it is improper to order an account merely to afford a party an opportunity to establish by testimony the allegations of his bill."

To Determine Usury.—When in a particular case the court has not enough before it to determine from the pleadings and proofs, or from the pleadings alone, whether the transaction be tainted with usury or not, it may do so by reference to a commissioner.[27]

To Reopen Settled Account.—An order for an account will not be awarded to reopen the investigation of the amount of an indebtedness which has been previously settled by the parties

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25. Bl. L. Dict., tit., "Reference."

26. **To Enable Complainant to Make out His Case.**—Hamilton *v.* Stephenson, 106 Va. 77, 82, 55 S. E. 577; Reager *v.* Chappelear, 104 Va. 14, 51 S. E. 170; Ammons *v.* South Penn. Oil Co., 47 W. Va. 610, 35 S. E. 1004; Lee County Justices *v.* Fulkerson, 21 Gratt. 182; Livey *v.* Winton, 30 W. Va. 544, 4 S. E. 451.

27. Rohrer *v.* Travers, 11 W. Va. 146.

with the aid of their counsel, and the integrity and correctness of which has not been impugned.[28]

In an Action at Law.—Under the West Virginia Code, in any case at law in which it may be deemed necessary the court may direct a commissioner in chancery or other competent person, either before or at the time of trial, to take and state an account between the parties, which account when thus stated shall be deemed prima facie correct and may be given in evidence to the court or jury trying the case.[29]

On Motion for Discharge of Treasurer.—The court may order a reference on a motion for the discharge of a treasurer.[30]

The statute provides for a reference to a "master commissioner." Evidently a commissioner in chancery is referred to.[31]

§ 21. To Make Inquiries.—The court, to lighten its own labors, may order that a mass of conflicting evidence must first go to a commissioner.[32]

In the absence of other proper evidence of the liabilities of a receiver chargeable on a fund under the control of the court, the cause should be referred to a commissioner to inquire into and take evidence touching the same.[33] But an order of reference is not to be made to enable a plaintiff to make out his case. It should not be made for the purpose of furnishing evidence in support of the allegation of the bill, nor until he has the right to demand it.[34]

To Determine Boundary.—Reference of a cause to a com-

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28. To Reopen Settled Account.—Hamilton *v.* Stephenson, 106 Va. 77, 55 S. E. 577.

29. W. Va. Code, § 4855. See Connell *v.* Yost, 62 W. Va. 66, 57 S. E. 299.

30. Accounts of Treasurer.—Va. Code, § 2792.

31. See Hickeman *v.* Painter, 11 W. Va. 386.

34. People's Nat. Bank *v.* Virginia Textile Co., 104 Va. 34, 51 S. E. 155.

35. Reager *v.* Shappelear, 104 Va. 14, 51 S. E. 170; Hamilton *v.* Stephenson, 106 Va. 77, 82, 55 S. E. 577; Savings' Bank *v.* Todd, 114 Va. 708, 77 S. E. 446.

32. To Make Inquries.—Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93.

missioner, to ascertain and report the location of a disputed boundary line, is proper when the evidence is conflicting as to the identity of monuments called for in the title papers; the identity of monuments and application of the description found in the deed, patent or other muniment of title to its subject matter being questions of fact, and the rules, applicable to undisputed or clearly established facts, questions of law.[35]

To Determine Liens.—Where, as provided by the Virginia Code, suit was brought against an insolvent corporation for the benefit of all the citizens of Virginia who held liens upon the funds, the bonds deposited with the state treasury, under the policies of the company, for losses, equitable value, return premiums or otherwise, and there had already intervened in the case a petition asserting the claim to a creditor's order that the complaint, which was subsequently abandoned on the situation of the case, at the time of the motion to dismiss was made, an order of reference was proper. It was necessary in order to properly dispose of the fund under its control, that the court should be informed as to liens upon it; and the usual and proper mode of securing this information is from the report of a commissioner, made after due notice.[36]

To Determine Title to Fund in Court.—The provisions of the Virginia Code, for referring a case to a commissioner in chancery to ascertain who is entitled to a fund paid into court and in what proportions, applies only to a fund in which there is a community of interest among the claimants, and not to a case involving distinct properties and ownership where the commissioners have returned a joint award. It was never intended to substitute the finding of a commissioner in chancery for that of the commissioners in determining the value of the respective properties.[37]

To Determine Attorneys' Fees.—Where a deed of convey-

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33. State *v.* King, 64 W. Va. 546, 63 S. E. 468.

36. To Determine Liens.—Va. Code, § 4214; German Nat. Ins. Co. *v.* Virginia State Ins. Co., 108 Va. 393, 61 S. E. 878.

37. Title and Fund in Court.—Va. Code, § 4374; Swann *v.* Washington Southern R. Co., 108 Va. 282, 61 S. E. 750.

ance, after describing the purchase notes sufficient to identify them, retained a lien on the land for the "due payment of said notes," the lien will cover the reasonable fees of attorneys provided for on the face of the notes for their collection, although this feature of the notes be not mentioned in the deed, it was held that, evidence as to the amount of the fees having been introduced by the complainant in advance of the hearing on the merits, a reference at the hearing to a commissioner to take proof and report upon them could not prejudice the defendant, and would not be error of which he could complain.[38] The above decision may be of interest to the profession of Virginia since the decision of the Supreme Court of Appeals holding a provision for attorneys' fees in a promissory is valid.[39]

§ 22. To Perform Ministerial Acts.—While the proceedings on reference involve the performance of certain ministerial acts, a ministerial act is not a subject of reference. Such acts are performed either incidental to or independent of reference.[40]

§§ 23-24. Necessity for Reference.

§ 23. Discretion of Court.—Whether a cause is a proper one for reference to a commissioner lies within the discretion of the trial court.[41]

In Kraper *v.* Shields, 20 Gratt. 377, it is said, "The question when it is proper, or may be useful, to resort to the aid of a commissioner, is one which addresses itself to the sound dis-

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38. To Determine Attorneys' Fees.—Clark *v.* Carlton, 4 Lea (Tenn.) 452.

39. Triplett *v.* Second Nat. Bank, 121 Va. 189, 92 S. E. 897; 2 Va. Law Reg., U. S., 321.

40. To Perform Ministerial Acts.—See ante, "Powers and Duties Independent of Reference," § 15.

41. Marshall *v.* Parter, 71 W. Va. 330, 76 S. E. 653.

"Whether it is proper in any given case for the circuit court to direct a reference to a commissioner or not, is a matter in which that court must of necessity exercise a wide discretion, and this court will not for that cause alone reverse a decree otherwise correct, although it may be of opinion that some of the questions referred may be such as the court itself, and not the commissioner, ought to determine." Thompson *v.* Catlett, 24 W. Va. 524.

cretion of the court, and as to which a large latitude of discretion must be allowed to the court; though of course the court ought to exercise such discretion soundly, to prevent unnecessary expense or delay; which seem to be the chief, if not the only evils, of an improper reference. The court is responsible for the correct decision of the cause, and can not shift such responsibility from its own shoulders to those of a commissioner. But it can avail itself of the assistance of a commissioner to prepare the cause and place it in the best possible state to enable the court to decide it correctly."

Submission to Commissioner Instead of Jury.—The court is not bound to direct an issue to a jury; in its sound discretion and for convenience it may do so, but if it considers an issue unnecessary, and deems it proper that the case should go to a commissioner instead of a jury, it may so direct.[42]

§ 24. RIGHT OF COURT TO DISPENSE WITH REFERENCE.—The court may state an account in a chancery cause without an order of reference to a commissioner,[43] if there is sufficient data and evidence in the cause to enable it to properly do so.[44] The court will, in an equity cause, proceed to make a final disposition of the suit, without reference to a jury or the commissioner, where such reference would occasion delay, trouble, and expense to the parties, far beyond any probable advantages to be gained thereby.[45]

As to Matters Admitted in Pleadings.—When, in a suit for a legacy the answer of defendant, executor, admits a sufficiency of

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42. Rohrer *v.* Travers, 11 W. Va. 146, 154; Grigsby *v.* Weaver, 5 Leigh 197; Samuel *v.* Marshall, 3 Leigh 567; Stannard *v.* Graves, 2 Call 369; Beverley *v.* Walden, 20 Gratt. 147.

43. Court May Dispense with Reference.—When a decree of the court ascertains the liens and fixes their priority, it is not necessary to refer the cause to commissioners for that purpose. Bock *v.* Bock, 24 W. Va. 586, 590; Anderson *v.* Nagle, 12 W. Va. 98; Smith *v.* Patton, 12 W., Va. 541.

44. Darby *v.* Gilligan, 43 W. Va. 755, 28 S. E. 737; Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93.

45. Blevins *v.* Armstrong, 3 Hayw. (Tenn.) 135.

assets in his possession to pay all debts and legacies the court may require the payment of the legacy without ordering an account.[46]

As to Facts in Evidence.—It is not error in the court below to refuse to direct a reference to a master, to ascertain matters sufficiently appearing in the facts in the case.[47]

To Determine Interest.—When the liability of a trustee is fixed, and the only question for consideration is the amount of interest with which he ought to be charged, the court may proceed to determine that question without reference to commissioner.[48]

§ 25. The Order of Reference.

Power to Order Reference.—The power to order a reference is necessarily possessed by the same courts that are given power to appoint commissioners in chancery, namely, each circuit, corporation and city court having chancery jurisdiction, in Virginia[49] and each circuit court and every court of limited jurisdiction for any incorporated city, town or village, in West Virginia.[50]

In the absence of statute the power is inherent in a court of chancery.[51]

Application for Order.—No application for an order of reference is necessary to enable the court to issue it; for the court may, of its own motion, order a reference to a commissioner in a proper case, as where there is much conflicting evidence.[52] But should a party desire a reference he must ask it. After a chancery cause has been heard and a final decree pronounced in the court below, without an order of reference in any wise suggested or asked by him, he can not assign such hearing without

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46. McRae *v.* Brooks, 6 Munf. 157; Sharpe *v.* Rockwood, 78 Va. 24, 33.

47. Baltimore, etc., R. Co. *v.* Supervisors, 3 W. Va. 319.

48. Cogbill *v.* Boyd, 79 Va. 1.

49. Va. Code, § 3319.

50. W. Va. Code, § 4846.

51. Claypool *v.* Johnston, 91 Ark. 549, 121 S. W. 941.

52. Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93.

such order, as error, for the first time, in the appellate court, unless it appears from the record that manifest injustice has been done him thereby, or that it was the duty of the court, of its own motion, if necessary, to send the cause to a commissioner before a final hearing.

In Dorr *v.* Dewing, 36 W. Va. 466, 15 S. E. 93, it is said: "That there should have been a reference to a commissioner is assigned as error in the petition, but is not mentioned or relied on in argument. In a case like this, if the parties could have agreed upon some commissioner acceptable to both, such a reference would certainly have facilitated the examination of the questions of fact; but no reference was asked in any pleading or by motion. Both parties took their proof, and submitted the cause to the court for final decision. The court, of its own motion, in order to lighten its own labors, might have well said this mass of conflicting evidence must first go to a commissioner. But for some good reason the court saw fit to go through the whole labor itself; and it comes too late with the party, after he has lost his case, to move for the first time, and in the appellate court, that the cause be sent to a commissioner."

It is irregular and error for a court, upon motion of a person not a party to the suit, and the record not showing he has an interest in the subject matter of the suit, to order a commissioner as ascertain and report whether the consideration of a deed was confederate money or good money; or whether the consideration of a deed was legal or illegal.[53]

Contents of Order.—In referring a case to a commissioner for a resettlement of accounts, it is competent for the court, and in accordance with the established practice, to instruct the commissioner as to the principles upon which the accounts should be made up.[54]

The order of reference may, and often does, expressly direct the commissioner to give to parties or their attorneys notice of the time and place of executing the reference ordered.[55]

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53. Henderson *v.* Alderson, 7 W. Va. 217.

54. Cogbill *v.* Boyd, 79 Va. 1, citing 2 Bart. Pr. 634.

55. Livesay *v.* Feamster, 21 W. Va. 83.

Where a cause is referred for ascertainment of certain matters by inquiry and proof, it is improper for the chancellor, before such inquiry has been made and proof taken, to forecast the commissioner's report and make him a mere copyist thereof.[56]

In Nelson *v.* Kownslar, 79 Va. 468, it is said, "After deciding that errors did exist, but pointing out none; after directing a restatement and settlement of accounts long since confirmed without any objection from any source, and which even the petition for rehearing did not in terms ask to disturb, and after devising a scheme of settlement, and fully and in detail stating the account accordingly, the court again, by this decree, refers the matter to a commissioner for proof. Proof of what? It is obvious that by this decree the commissioner was made a mere copyist. It is often necessary and proper for courts to direct commissioners as to the principles upon which to settle accounts, but here the details are gone into, the former settlements overturned, all the account, in effect, newly settled, and, in numerous particulars, upon wholly erroneous principles. But it is not necessary to examine these settlements in detail; it is enough to show that the decrees directing them are erroneous."

Construction of Order.—The general language of an order of reference must be construed in connection with the pleadings, and, therefore, a requirement on the commissioner to report debts due from certain persons for the land in controversy, "or from any other person," will embrace only such persons as are parties to the suit.[57]

Cure of Defects in Order.—An order directing an account of debits only, although erroneous, is cured by a subsequent order to take proof and report as to debits and credits.[58]

Objections to Order.—When an order of reference has not been executed, the fact that it was improperly made is not assignable error.[59] On the other hand an objection to the refer-

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56. Nelson *v.* Kownslar, 79 Va. 468.

57. Murrell *v.* Watson, 1 Cooper's Chy. (Tenn.), 342.

58. Stull *v.* Goode, 10 Husk (Tenn.) 58.

59. Reager *v.* Chappelear, 104 Va. 14, 51 S. E. 170.

ence of a cause to a commissioner in chancery comes too late after the cause has been fully heard and determined by him on the merits against the objector.[60]

Setting Aside Order.—If, after great delay in executing an order of reference made pendente lite, the court sets it aside, on motion of one of the parties, without any previous notice or rule to show cause; but it does not appear, by a bill of exceptions or otherwise, that any step has been taken to carry such order of reference into effect; after which, a fair trial is had, and judgment entered accordingly; such judgment ought to be affirmed.[61]

Effect of Order on Finality—On Another Suit Pending.—A decree may be final although it directs a reference to the master, provided it contains in itself all the consequential directions that may depend upon the result of the report, when no further decree will be necessary in the case.[62]

Where two suits having the same object are pending, a decree in one for an account, suspends the other, but a suit to administer a deceased partner's separate property for his separate creditors, and a suit to administer the partnership property for the partnership creditors, have not the same object. In such case this rule does not apply.[63]

§ 26. Premature Reference.

To justify an order of reference the cause should be so far developed by the pleadings and the proofs as to show the necessity and propriety of an order of account, and the extent to which it should go.[64] While, from the nature of the case and of

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60. Dewing *v.* Hutton, 48 W. Va. 576, 37 S. E. 670.

61. Arnolds *v.* Jacksons, 6 Munf. 106.

62. Delap *v.* Hunter, 1 Sneed (Tenn.) 1001.

63. Robinson *v.* Allen, 85 Va. 721, 8 S. E. 835.

64. Premature Reference.—Bresee *v.* Bradfield, 99 Va. 331, 38 S. E. 196; Millhiser *v.* McKinley, 98 Va. 207, 35 S. E. 446; Beale *v.* Hall, 97 Va. 389, 34 S. E. 53; King *v.* Burdett, 44 W. Va. 561, 29 S. E. 1010; First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554, 555; Neal *v.* Buffington, 42 W. Va. 327, 331, 26 S. E. 172.

"The law is well stated in 2 Barton's Ch. Pr., at page 630: 'The

the relief sought, an account is necessary to enable the court to do justice between the parties, an order of reference should not be entered until its propriety has been made to appear by the evidence; and if such a case be submitted upon the bill without proof, and an answer denying its allegations, it should be dismissed.[65]

The reference should not be made to enable the complainant to make out his case nor until he has the right to demand it.[66] Even where a decree for an account is essential to the relief sought it ought not to be granted until the plaintiff has established by proof at least a prima facie right to the relief he seeks, and that an account is necessary to enable the court to render a proper decree in the cause.[67] A mere charge that the defendant has illegally collected a large sum of the complainant without stating how much in the aggregate, or the particulars of how the sum accrued, especially when denied by the defendant and unsupported by proof, does not entitle the complainant to a de-

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settled rule in respect to order of reference is that before an application for one shall be granted it must appear, with reasonable certainty, that an order will be necessary, and it will not be made upon the suggestion that in some contingency one will be required; for it will not do to put the defendant to the trouble and expense of rendering an account until it is ascertained that the plaintiff has a right to demand it, nor will a reference be made for the purpose of furnishing evidence in support of the allegations of a bill.'" Baltimore, etc., Co. *v.* Williams, 94 Va. 422, 26 S. E. 841.

It is irregular and improper practice to refer a suit in chancery to a commissioner for the purpose of taking testimony therein before all the issues are properly made up. Worley *v.* Dade County (Fla.), 42 So. 527.

"It is the duty of the court to settle issues addressed to him before a reference is ordered to the master." Hascall *v.* Hafford, 107 Tenn. 355, 65 S. W. 423.

65. But where there is nothing in the pleadings and proofs to make an account proper and necessary, and the court has improvidently granted an order of reference, it is harmless error, for which the cause should not be reversed. Bresee *v.* Bradfield, 99 Va. 331, 38 S. E. 196.

66. Savings' Bank *v.* Todd, 114 Va. 708, 77 S. E. 446.

67. Bresee *v.* Bradfield, 99 Va. 331, 38 S. E. 196.

cree for an account.[68] Unless by the prayer of the bill for an account and discovery of assets, or some petition or special application to the court by the plaintiff, or defense by a defendant, showing that such account is required by the parties, or some of them, no such account ought to be decreed; but when the cause is, in other respects, ready, the court should proceed, at once, to a decree de bonis, etc.[69]

Before Hearing.—Regularly a reference can not be directed until the hearing, without consent.[70]

In Cutting *v.* Carter, 4 Hen. & Munf. 478, it is said, "An order for an account is not to be made as of course, and should not be directed, but upon a hearing, unless the parties consent."

The rule followed in Tennessee is that no order of reference should be made until the cause has been prepared and set for hearing and regularly reached on the trial docket, and there has been a decree settling the legal rights of the parties, and the principles upon which the reference should be executed.[71]

In Patton *v.* Cone, 1 Lea (Tenn.) 14, it is said, "a general reference, which settles nothing where there are questions of law involved, must be necessarily confusing to the clerk (commissioner) who confines himself to his own province, the findings of facts. It is impossible for him to act intelligently unless he assumes, in connection with his own functions, the functions of the judge. He has no guide as to what he shall omit or insert, or as to how he shall arrange his material. By far the easiest and best mode of conducting such case is to have a hearing upon the merits before the reference."

Where Answer Not Responsive or Sets up New Matter.—An order of reference made on a bill, to the gravamen of which the answer does not respond by denial, is not premature.[72] In a suit

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68. Baltimore, etc., Co. *v.* Williams, 94 Va. 422, 26 S. E. 841.

69. Cocke *v.* Harrison, 3 Rand. 494, 500.

70. **Before Hearing.**—Cutting *v.* Carter, 4 Hen. & M. 478; Clarke *v.* Tinsley, 4 Rand. 250; Bassett *v.* Cunningham, 7 Leigh 402, 410. See also, Patterson *v.* Martin, 33 W. Va. 494, 497, 10 S. E. 817, 819.

71. Wessells *v.* Wessells, 1 Cooper's Chy. (Tenn.) 58.

72. **Answer Not Responsive.**—Grant *v.* Cumberland, etc., Co., 58 W. Va. 162, 52 S. E. 36

by the state, pursuant to chapter 105, Code of West Virginia of 1906, to sell its waste and unappropriated lands, it is not error to refer the cause to a commissioner, before proof of the allegation of the bill, although defendants and claimants have filed answers alleging title in themselves and denying that the land proceeded against is waste and unappropriated, particularly where the answers are not specific, or are unequivocal, and the boundary lines are doubted, or in dispute, and a survey and report is necessary to locate the land.[73]

Though the general rule is that an account should not be ordered in any case, unless shown to be proper by the pleadings and proofs in the cause; yet the rule is not applicable to a case where the answer sets up new and affirmative matter, upon which the defense is rested, and the burden of proving which lies on the defendant.[74]

Where Time Allowed for Filing Answer.—If the court overrules a demurrer to a bill and gives the defendant a certain time in which to answer, it can not properly make an order of reference to a commissioner, until the time, which was given to the defendant to answer, has elapsed.[75]

In Goff *v.* McBee, 47 W. Va. 153, 34 S. E. 745, it is said, "If the court overrules a demurrer to a bill, and gives the defendant a certain time in which to answer the bill, it can not properly order a reference of the case to a commissioner to ascertain the amount of the plaintiff's demand till time has elapsed which was given the defendant to answer; nor can it then order such reference if the answer is filed, and denies all the facts in which the plaintiff's claim is based. If such answer be filed, no such reference can properly be made till the plaintiff, by evidence, has proven that he has a demand against the defendant." And in Billingslea *v.* Manear, 47 W. Va. 785, 35 S. E. 847, referring to it, "In that case the defendant was allowed thirty

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73. State *v.* Moore, 71 W. Va. 285, 76 S. E. 461.

74. Porter *v.* Young, 85 Va. 49, 6 S. E. 803.

75. Time Allowed for Filing Answer.—Moreland *v.* Metz, 24 W. Va. 119; Pecks *v.* Chamber, 8 W. Va. 210; Nichols *v.* Nichols, 8 W. Va. 175; Park *v.* Petroleum Co., 25 W. Va. 108, 109.

days to answer, and in his answer denied all the material allegations of the bill; yet on the day the answer was filed the court directed a sale of the land. From these rulings I conclude that the practice is well established that upon the overruling of a demurrer the defendant is entitled to a rule to answer, and that the court can not properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand, the real estate owned by the defendant, the liens thereon, and their priorities, until the time has elapsed given the defendant to answer."

Effect of Premature Reference.—The appellate court will not reverse a decree, properly made on a commissioner's report for the sole reason that the cause, in the condition in which it was, when the order of reference was made, ought not to have been referred to him.[76]

(*To be continued.*)

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76. Dudley *v.* Barrett, 66 W. Va. 363, 66 S. E. 507.